In the Supreme Court of the United States

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OCTOBER TERM, 1968.

No. 774.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,

Petitioner,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Respondents.

B. A. TURNER, *et al.*, and BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,

Petitioners,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Respondents.

BRIEF IN OPPOSITION FOR RESPONDENT BROTHERHOOD OF LOCOMOTIVE ENGINEERS.

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Respondents.

BRIEF IN OPPOSITION FOR RESPONDENT BROTHERHOOD OF LOCOMOTIVE ENGINEERS.

QUESTION PRESENTED.

The Brotherhood of Locomotive Firemen and Enginemen ("Firemen's Union") is the bargaining representative for the craft of locomotive firemen on the Louisville and Nashville Railroad Company ("L&N"), and the Brotherhood of Locomotive Engineers ("Engineers' Union") is the certified representative for the craft of locomotive engineers on L&N.

The Engineers' Union executed an agreement with L&N covering apprentice locomotive engineers as a part of the craft represented by that labor organization. The Firemen's Union sought to enjoin the effectuation of that agreement claiming that (1) the Firemen's Union had sole representational authority to bargain for apprentices to the engineers' craft and that (2) the Engineers' agreement conflicted with the Firemen's collective agreement and established practices. The district court dismissed on the basis that it lacked jurisdiction to decide the jurisdictional dispute between the two unions.

Eighteen months later, the Firemen's Union again sought to restrain the continuation of the apprentice locomotive engineer training program and the employment of engineers by L&N from sources other than engineers from other railroads or L&N firemen. The Firemen's Union also alleged that the L&N and the Engineers' Union were undermining the Firemen's representational and bargaining authority for the craft of firemen by reason of the apprentice engineer program. Once again, the district court dismissed for lack of jurisdiction to determine the proper employee representation in these crafts.

The cases were consolidated on appeal. Finding the controversy was a jurisdictional dispute between two unions which the courts had no power to resolve, the court of appeals affirmed.

The question presented is whether, in a suit by the craft representative of firemen to enjoin the effectuation and implementation of an apprentice engineer agreement negotiated by the craft representative for engineers, the federal courts have the power to decide the jurisdictional dispute between the two unions as to their overlapping interests in determining the proper representative for apprentice engineers. Ancillary thereto is the question

whether jurisdiction is conferred on the courts to decide the merits of the jurisdictional dispute when it is claimed that the Engineers' apprentice agreement conflicts with the collective agreement of the Firemen's Union and gives unlawful assistance to the Engineers' Union in that some engineers will not come from the ranks of the firemen.

STATEMENT.

Background of the Events Leading to This Controversy.

In large measure, an understanding of this case depends upon a description of the underlying situation between the true adversaries herein, the Engineers' Union and the Firemen's Union. To a limited extent, it is necessary to examine the technological advances and functional changes in the railroad industry which gave momentum to the long standing jurisdictional conflict between these two unions.

For many years, the Engineers' Union has been the recognized collective bargaining representative for the craft of locomotive engineers on the L&N and, on December 31, 1957, was certified as the bargaining representative of this craft by the National Mediation Board ("NMB") in a representational dispute between the two Brotherhoods (No. 17,588, A.35c).[1] The Firemen's Union has been and is the bargaining representative for the craft of locomotive firemen on the L&N (No. 17,588, A.6a). And throughout many years, the Engineers and the Firemen, as bargaining representatives for the respective crafts, have been involved in a series of disputes concern-

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[1] As in the petition, references are to the appendices in the Court of Appeals for the Sixth Circuit (Case Nos. 17,588 and 18,479). References to the appendices of the Firemen's Union carry the suffix "a"; to the appendices of the L&N, "b"; and to the appendices of the Engineers' Union, "c."

ing the scope of their jurisdictional authority and the power to govern matters related to the craft of locomotive engineers.[2]

The dispute specifically involved herein, which the Engineers' Union submits is jurisdictional,[3] may be considered to have originated as a result of certain section 6 Notices served on November 2, 1959 by the nation's rail carriers upon the so-called operating brotherhoods, including the two unions in this case. One of the issues raised therein concerned the retention or removal of firemen on all diesel-electric locomotives used in freight and yard service. See *Brotherhood of Locomotive Engineers v. Baltimore & Ohio R. Co.*, 372 U. S. 284 (1963). However, the underlying cause of this dispute may be at-

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[2] See *General Committee v. Missouri-K.-T. R. Co.*, 320 U.S. 323 (1943); *General Committee v. Southern Pac. Co.*, 320 U.S. 338 (1943).

[3] In *Carey v. Westinghouse Corp.*, 375 U.S. 261, 263 (1964), this Court defined the term "jurisdictional dispute" in the following manner:

> "We have here a so-called 'jurisdictional' dispute involving two unions and the employer. But the term 'jurisdictional' is not a word of a single meaning. In the setting of the present case this 'jurisdictional' dispute could be one of two different, though related, species: either—(1) a controversy as to whether certain work should be performed by workers in one bargaining unit or those in another; or (2) a controversy as to which union should represent the employees doing a particular work."

See also *Transportation-Communication Employees Union v. Union Pacific Co.*, 385 U. S. 157, 161 (1966).

Applying this distinction and the similar differentiation made by the amicus brief of the Solicitor General in the *Carey* case, the Engineers' Union submits that this jurisdictional dispute involves craft composition; for the question here is not which of the two labor organizations will do certain work, such as electrical inspection, but rather which of the two unions will represent certain employees—apprentice locomotive engineers. However, petitioners have incorrectly assumed that jurisdictional disputes are limited to work-assignment controversies (Pet., p. 19, n. 1).

tributed to the technological advances occurring through the dieselization of motive power on the railroads. According to the Presidential Railroad Commission, dieselization has led to the almost complete elimination of "the principal work which firemen had customarily done when they worked on steam locomotives." [4]

The question of the retention or removal of locomotive firemen on road freight and yard diesel-electric locomotives was subsequently the subject of further study by Emergency Board No. 154, appointed by the President on April 3, 1963, pursuant to the provisions of Section 10 of the Railway Labor Act, 45 U. S. C. 160, and of compulsory arbitration by Arbitration Board No. 282, established by joint resolution of Congress on August 23, 1963, Public Law 88-108, 77 Stat. 132. Each of these Boards found, as did the Presidential Railroad Commission, that the lookout, mechanical, and relief functions, and also the feature whereby many engineers had come from the ranks of firemen, were not significant to require the retention of locomotive firemen on all diesel-electric locomotives in road freight and yard service.

On November 26, 1963, Arbitration Board No. 282 issued its award, 41 Lab. Arb. 673. In essence, the award authorized the elimination of ninety percent of the existing firemen positions on freight and yard engine crews on the nation's railroads (No. 17,588, A. 31a-32a).

As a result of the award of Arbitration Board No. 282, eighteen thousand firemen were severed from employment during 1963 to 1966. *Brotherhood of Railroad*

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[4] Report of the Presidential Railroad Commission, Washington, D. C., February 1962, p. 36. The Commission was created on November 1, 1960, by Executive Order 10891 to study the questions presented by the aforementioned section 6 Notices of November 2, 1959 and to publish a report of its findings and recommendations.

Trainmen v. Akron & Barberton Belt R. Co., 385 F. 2d 581, at 610, n. 1 (D.C. Cir. 1967). Naturally, this declination in the numbers of locomotive firemen would be "a staggering blow to the BLF&E," *id.* at 591, for there would be a similar relationship to the membership figures of the Firemen's Union as the union principally representing firemen.

Thus, in an effort to stop the continuing decline in its membership, on March 25, 1965, as to the L&N, and on November 15, 1965, as to most other of the nation's railroads, the Firemen's Union served purported section 6 Notices relating to apprentice locomotive engineers, which is the subject matter of this proceeding (No. 17,588, A. 7c, 14c).[5]

The Engineers' Union had been informally negotiating with the carriers regarding training programs for apprentice locomotive engineers prior to the November 15th notices (No. 17,538, A. 27c). Taking umbrage at the

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[5] Petitioners say the notices related to the establishment of a formal training program for firemen (Pet., p. 4). This is a transparent obfuscation of the facts. There has not been nor is there any training necessary to be a fireman. Further, the notice of November 15, 1965, is subtitled as "training for railroad locomotive enginemen apprentices," which are defined as persons "engaged in learning the craft of locomotive enginemen." There is no craft of enginemen, only engineers and firemen, 45 U.S.C. 153, First (h), and the substance of the proposal leaves no doubt as to its purpose—to create apprentices in the engineers' craft. For example, in regard to seniority, the Firemen's notice states, "Apprentices who have completed this training shall receive a seniority date as locomotive engineer." Any remaining doubt as to the purpose of this training program is dispelled by the appendix thereto which states, "When the apprentice has successfully completed the term of apprenticeship and has passed the final examination, he then will be qualified as a railroad locomotive engineer and will receive a seniority date as locomotive engineer in keeping with the appropriate provisions of the current agreement," *National Mediation Board v. Brotherhood of Locomotive Engineers, infra*, pp. 21-22. The Firemen's proposal on L&N, though using somewhat different language, has the same effect (No. 17,588, A. 8c, 14c).

proposals of the Firemen's Union, the Engineers' Union immediately informed all concerned carriers that "the instant request of the BLF&E infringes upon the statutory rights of the duly designated representative of the craft of locomotive engineers and the employees within that craft," and therefore, asserted, "its [Firemen's] demand on a national basis is in violation of the Railway Labor Act" (bracket supplied). The carriers and the NMB were also informed that the Engineers' Union would enforce its statutory rights as bargaining representative for the craft of locomotive engineers to represent and bargain for apprentice locomotive engineers through appropriate legal measures, which were subsequently elaborated upon to include the right to strike (No. 17,588, A. 25c-27c).

The Situation Before the National Mediation Board and the Suit Involving It.

On June 6, 1966, the nation's rail carriers, including the L&N, applied for the NMB's services under Section 5, First of the Act in connection with the Firemen's section 6 Notices (No. 17,588, A. 24c-25c). The carriers' request was based upon a jurisdictional or representational issue "as to which of the two disputing organizations may legally bargain for and on behalf of apprentice locomotive engineers," citing in support of the dispute the Firemen's notices of November 15, 1965 and the Engineers' letter of November 17, 1965 (No. 17,588, A. 24c). There followed an exchange of views between the NMB, the carriers, and the two organizations (No. 17,588, A. 15c-23c).

On June 21, 1966, the NMB denied the carriers' request for its services (No. 17,588, A. 15c-18c). In support of its denial, the NMB said: "[T]he question as posed involved a question of representation. Such issues are

resolved under Section 2, Ninth, of the Railway Labor Act." (No. 17,588, A. 18c).

Upon receipt of a copy of the NMB's letter the Engineers' Union duly noted the sentence, "such issues are resolved under Section 2, Ninth of the Railway Labor Act" and, accordingly, on June 30, 1966, sought to invoke the Board's services pursuant to Section 2, Ninth, to determine which organization, the Engineers or the Firemen, represents apprentice locomotive engineers on the L&N (No. 17,588, A. 34c-35c). The parties filed lengthy position letters with the NMB. One of those letters is worthy of comment. On July 13, 1966, the President of the Firemen's Union filed with the Board that organization's reply to the request of the Engineers' Union (No. 17,588, A. 44c-46c). In that document, the Firemen's Union clearly indicates that a representational dispute does exist between the two unions in regard to which organization does, in fact, represent apprentice locomotive engineers on the L&N and the various carriers throughout the country (No. 17,588, A. 45c).

On July 22, 1966, the NMB issued its directions in the two cases before it which are relevant to the instant proceeding (No. 17,588, A. 46a-49a; 50c-51c). First, in regard to the carriers' application and request for a hearing thereon, the Board reiterated its contention that the question as to which organization could properly and lawfully represent and bargain for apprentice locomotive engineers "involved a question of representation under Section 2, Ninth of the Railway Labor Act," 45 U. S. C. 152, Ninth (No. 17,588, A. 50c). The request for a hearing by the applicant carriers was, therefore, denied. With respect to the request of the Engineers' Union for adjudication of the opposing claims of the two organizations re-

garding apprentice locomotive engineers on the L&N, the NMB said that the statements failed to reveal a position that a representation dispute under Section 2, Ninth of the Act existed (No. 17,588, A. 48a). However, this statement conflicts with the comment of the Board contained in both its letter of June 21, 1966, and its letter of July 22, 1966, as to the carriers' application for services under Section 5, First of the Act. In conclusion, the NMB stated without description that "procedures other than those outlined in Section 2, Ninth of the Railway Labor Act are available to settle such disputes" (No. 17,588, A. 48a). On this basis, the Board concluded that a representation dispute under Section 2, Ninth did not exist over which it had jurisdiction; therefore, the application of the Engineers' Union should be dismissed (No. 17,588, A. 49a).

Since the Firemen's Union invoked the services of the National Mediation Board for purposes of mediation relative to its purported section 6 Notices, the NMB set August 4, 1966, as the date for mediation conferences between the Firemen's Union and the L&N respecting the apprentice locomotive engineer notices. On August 4, 1966, the Engineers' Union filed a complaint with the United States District Court for the District of Columbia seeking declaratory and injunctive relief against the NMB, the Firemen's Union, and six railroads, including the L&N. *Brotherhood of Locomotive Engineers v. National Mediation Board*, 284 F. Supp. 344 (D.D.C. 1968), *appeal pending* (Case Nos. 22,050 and 22,185). In part, the Engineers' Union requested the court to issue a mandatory injunction directing the NMB to fulfill its statutory duty under Section 2, Ninth of the Railway Labor Act to decide whether apprentice locomotive engineers are encompassed within the craft of locomotive engineers or within the craft of

locomotive firemen. As a result of this suit, mediation conferences were recessed pending a determination in that action.

Upon cross-motions for summary judgment in that case, that district court found that the federal courts have the power to determine whether the NMB has performed its statutory duty under Section 2, Ninth of the Act and that the Board had failed to perform that duty. Accordingly, the district court ordered the NMB to perform its statutory duty under Section 2, Ninth, to investigate and certify which of the two crafts—engineers or firemen—if either, encompass apprentice locomotive engineers.

The Cases Now Before This Court.

On April 28, 1966, the L&N and the Engineers' Union entered into an agreement respecting apprentice locomotive engineers on the L&N (No. 17,588, A. 5b). On June 27, 1966, the Firemen's Union sought to enjoin the effectuation of that agreement between the L&N and the Engineers by filing for injunctive relief in the United States District Court for the Western District of Kentucky (No. 17,588, A. 1a; 5a-11a). The temporary restraining order issued June 28, 1966 (No. 17,588, A. 1a) was dissolved on July 5, 1966 (No. 17,588, A. 2a), and the motion for temporary injunction was overruled by the following language:

> "As a matter of law this action involves a controversy between BLF&E and BLE, each of which is a labor organization within the meaning of the Railway Labor Act, as to which of those organizations is the exclusive bargaining representative for and in behalf of the apprentice locomotive engineers employed by the L&N and this court has no jurisdiction to determine that controversy, the determination of which is exclu-

sively within the jurisdiction of the National Mediation Board. *Brotherhood of Ry. & S. S. Clerks v. United Air Lines,* 325 F. 2d 56 (C.A. 6th, 1963)." (No. 17,588, A. 42a).

After the NMB had dismissed the Engineer's application for its services under Section 2, Ninth, the Firemen's Union filed a motion for rehearing and new trial. This motion was overruled on September 29, 1966, on the basis that, regardless of any action—or inaction—of the NMB, the federal courts do not have jurisdiction to determine the merits of the dispute (No. 17,588, A. 45a).

Approximately fifteen months later, the Firemen's Union filed its second complaint concerning the effectuation and implementation of the Engineers' apprentice engineer agreement of April 28, 1965. The allegations therein and the relief sought were quite similar to those contained in the first complaint. However, the second complaint contained embellished allegations that the Engineers' Union and the L&N were, through the apprentice engineer program, interfering with the representational rights of the Firemen's Union. In addition, it was alleged that the carrier's hiring of apprentice locomotive engineers rather than firemen was advantageous to the Engineers' Union as far as membership. On the other hand, it was further alleged that the hiring practice was disadvantageous to the Firemen's Union, since those employees had not gone through the ranks of firemen and were not as likely to join the Firemen's Union.

Once again, the district court, looking through form to substance, found that the suit in fact involved a jurisdictional dispute. Once again, the district court found that regardless of what action may have been taken by the NMB, the court did not have any power to adjudicate the jurisdictional dispute involved between the two unions.

And once again, the district court dismissed for lack of jurisdiction.

The cases were consolidated on appeal. The Court of Appeals for the Sixth Circuit affirmed the dismissal of the complaints in both actions, stating that the controversy presented a "jurisdictional" dispute involving an asserted overlapping of the interest of the two crafts which necessitated a determination of the point where the authority of one craft ends and the other begins. *Brotherhood of Locomotive Firemen and Enginemen v. Louisville and Nashville R. Co.*, 400 F. 2d 572, 575 (1968).

From certain incorrect assumptions offered in petitioners' statement of the case, the Firemen's Union contends that the Engineers' agreement for apprentices infringes upon its representational and bargaining authority for the firemen's craft and violates its collective agreements for firemen, thereby leading to interference and coercion within the meaning of the Act[6] (Pet., p. 4). Respondent, therefore, believes that clarification of those purported facts is required.

First, the Firemen's Union assumes that there is a shortage of firemen which Arbitration Board No. 282 and other Boards have found are not needed (Pet., p. 5). In fact, it is the problem of the lack of engineers which must be met. As the number of locomotive firemen employed, and thus the number of locomotive firemen qualified for

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[6] Much of the statement of the Firemen's Union goes to the merits of its position as to why it considers that it, rather than the Engineers' Union, should represent apprentice engineers. On the other hand, the Engineers' Union has contended throughout that it, as bargaining representative for the craft of locomotive engineers, has the exclusive right to bargain on the matters of hiring, qualifications, training and seniority of locomotive engineers and therefore for apprentice locomotive engineers, whom it considers to be a part of the journeyman craft represented by it (No. 17,588, A.38a; 25c-27c; 34c; 36c-37c).

promotion to locomotive engineers, has been reduced following the effectuation of the award of Arbitration Board No. 282, L&N found it necessary to provide an additional source for obtaining locomotive engineers. While the Firemen's Union implies that the L&N paid heavy bonuses to induce older engineers to retire in order to accelerate apprentice hiring (Pet., pp. 8-9), the separations to which it refers occurred in the summer of 1964, shortly after the effective date of Award 282 and in pursuance thereof (No. 18,479, A. 15b).[7] In addition, in further attempting to limit the number of employees who may have been available as engineers, the Firemen's Union in 1965 sought and obtained an order directing L&N not to conduct classes or examine firemen for promotion to engineers who had not had three years road experience. *Brotherhood of Locomotive Firemen and Enginemen v. Louisville and Nashville R. Co.*, Civil Action No. 5134 (W. D. Ky. 1965) (No. 18,479, A. 23b-30b; 51a-52a).

In other words, the facts show that the number of engineers required to run the nation's trains must be obtained from sources additional to locomotive firemen. Accordingly, the Engineers' Union exercised the prerogative available to it, as the sole and exclusive bargaining representative of that craft, to represent the apprentices to that craft and further, in that capacity, to establish their seniority in the craft of locomotive engineers, a sub-

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[7] Apparently, the L&N encouraged the retirement of a number of its older firemen and engineers who had already reached the retirement age of 65 or closely approaching it by individually offering a separation payment to them. This plan was accepted on an individual basis by a number of the carrier's older employees. These separation payments were accorded without regard to any union affiliation (No. 18,479, A.16b). The payments appear to be in accord with Award 282; and to the best knowledge of this respondent, the Firemen's Union never objected to these practices by the L&N or other carriers until the second complaint was filed herein.

ject within its jurisdiction. Conversely, the Firemen's Union, in its transparent attempt to preserve its existence and organization, laid claim to this same area on the basis that it, as the bargaining representative of the craft of firemen, can determine working conditions and seniority of locomotive engineers.

Whether or not Section 2, Eleventh (c) of the Railway Labor Act permits engineers and firemen to be members of either the Engineers' Union or the Firemen's Union is not relevant to this proceeding as contended at page 4 of the petition. There are no union shop agreements for these crafts on the L&N. Thus, an engineer coming from the ranks of the apprentice locomotive engineer training program may belong to either union. Some have joined the Firemen's Union while others have elected not to be a member of either union (No. 18,479, A. 7a; 6b; 9b).

The chief complaint of the Firemen's Union—upon which it bases its ultimate conclusions as to interference and coercion—would appear to be that the apprentice qualified engineer upon performing service as an engineer acquires fireman's seniority as of the same date that he acquired seniority as an engineer. The only reason that these engineers obtain a seniority date on the fireman's seniority roster is due to Article 26 of the Firemen's agreement with L&N (No. 18,479, A. 9a; 13b). Whether or not these engineers are entitled to dual seniority as firemen is a question of interpretation and application of the various provisions of the collective bargaining agreement between the Firemen's Union and L&N, and that agreement between the Engineers' Union and the L&N. For example, a question has arisen regarding the meaning of "hired engineers." That question, which was specifically raised in the first complaint, is within the jurisdiction of the National Railroad Adjustment Board (No. 18,479,

A. 10b-11b).[8] While the Firemen's Union stresses its interpretation of these agreements in the petition before this court, it has refused to submit that dispute to the Adjustment Board (No. 18,479, A. 11b).

Thus, the fact that the apprentice qualified engineer acquires a concurrent seniority date as a fireman is due to the provisions of the Firemen's agreement. Accordingly, the complaint of the Firemen's Union is not the result of outside forces but of its own choosing, particularly since it, as craft representative of the firemen, could serve a proper notice on L&N seeking to change or modify that provision in its agreement.

After the threshold question of jurisdictional or representational authority as to apprentice locomotive engineers, *i.e.*, which organization properly represents and can bargain for these apprentices, is resolved, each and every purported fact contained in the petition provides its own answer. For instance, if the certification of the Engineers' Union for the craft of engineers includes the apprentices in that craft, it would naturally follow that the apprentice program is sponsored by it. It also follows that the instructors for the apprentices would come from the journeyman craft of engineers, admittedly most of whom are members of the Engineers' Union. It would be ludicrous to use firemen to train engineers. However, in fact, some engineers who are local chairmen of the Firemen's Union have been used as instructors (No. 18,479, A. 14a; 17b).

Taken as a whole, the facts succinctly indicate that the underlying dispute is jurisdictional in nature—a clear dispute, colored by the effects of Award 282, as to the representational limits of the craft of firemen as compared

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[8] See on this point, *infra*, pp. 19-20, and n. 9 discussion.

with the craft of engineers. Thus the issue before this Court is whether the court of appeals erred in concluding that the instant controversy is a jurisdictional dispute over which the federal courts do not have jurisdiction to make the determinations apparently requested.

REASONS FOR DENYING THE WRIT.

This case does not present any important or novel question of law but only involves the well settled principle that the federal courts do not have jurisdiction to determine the merits of a "jurisdictional" dispute between two unions. The court of appeals held that the district court was correct in finding that it did not have the power to decide which craft, engineers or firemen, encompassed apprentice locomotive engineers and, therefore, could not determine which union had representational authority for those apprentices. In so holding, the court of appeals intimated that the instant dispute is "within the exclusive jurisdiction of the National Mediation Board." Whether the court of appeals was right in that statement—and this respondent submits it was—is not a proposition that needs to be reviewed at this time by this Court but should await consideration, if at all, in the proper case specifically presenting that question.

Contrary to petitioners' assertions, the decision below is not in conflict with any holding of this Court or any decision of the courts of appeals, and raises no question under the Railway Labor Act which merits this Court's review.

1. The decision below correctly follows the prior rulings of this Court. Having assumed that the designation of the Firemen's Union as bargaining representative for the craft of firemen on the L&N encompasses apprentice locomotive engineers (Pet., p. 12), petitioners rely

upon this Court's rulings that the federal courts may enforce the mandatory provisions of Section 2, Third and Fourth of the Act by granting appropriate injunctive relief, *Texas & No. Ry. Co. v. Brotherhood of Ry. & S. S. Clerks,* 281 U. S. 548 (1930); and *Virginian Ry. Co. v. System Federation,* 300 U. S. 515 (1937).

As a matter of fact, the Engineers' Union has consistently founded its position upon the complete teaching of the *Virginian Railway* case. If, as the Engineers' Union asserts, it is the certified bargaining representative of locomotive engineers on the L&N, then L&N has the statutory duty to bargain only with the Engineers respecting apprentice engineers and the negative duty to bargain with no other organization on that subject or the matters of hiring and seniority of engineers. Having a duty to bargain only with the Engineers, L&N would violate Section 2, Ninth of the Railway Labor Act if it were to negotiate or bargain with the Firemen in those respects.

Thus, the following language of the court in the *Virginian Railway* case is applicable hereto:

> "Both the statute and the decree are aimed at securing settlement of labor disputes by inducing collective bargaining with the true representative of the employees and by preventing such bargaining with any who do not represent them. The obligation imposed on the employer by § 2, Ninth, to treat with the true representative of the employees as designated by the Mediation Board, when read in the light of the declared purposes of the Act, and of the provisions of § 2, Third and Fourth, giving to the employees the right to organize and bargain collectively through the representative of their own selection, is exclusive. *It imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other.*" (Emphasis supplied.) *Id.* at 548.

While both unions concede that the present controversy grows out of an application of the principles of majority representation and collective bargaining and, in fact, employ the axioms underlying that admission, the instant cases necessarily involve a jurisdictional dispute—an asserted overlapping of the interests of the two unions. *General Committee v. Missouri-K.-T. R. Co.*, 320 U.S. 323 (1943). There, in differentiating the holdings in the *Clerks* case and the *Virginian Railway* case from the principles applicable to jurisdictional disputes, the Court said:

> "It necessitates a determination of the point where the authority of one craft ends and the other begins or of the zones where they have joint authority. In the Clerks case and in the Virginian Ry. Co. case the Court was asked to enforce statutory commands which were explicit and unequivocal. But the situation here is different. Congress did not attempt to make any codification of rules governing these jurisdictional controversies. It did not undertake a statement of the various principles of agency which were to govern the solution of disputes arising from an overlapping of the interests of two or more crafts. It established the general principles of collective bargaining and applied a command or prohibition enforcible by judicial decree to only some of its phases." *Id.* at 335.

Further, there can be no question that jurisdictional disputes, whether involving representation rights or determination of the respective work to be performed by two or more competing or overlapping crafts, are not to be litigated in the courts. In *General Committee v. Missouri-K.-T. R. Co., supra,* this Court said:

> "However wide may be the range of jurisdictional disputes embraced within § 2, Ninth, Congress did not select the courts to resolve them. * * * If a narrower view of § 2, Ninth, is taken it is difficult to believe

that Congress saved some jurisdictional disputes for the Mediation Board and sent the parties into the federal courts to resolve the others." *Id.* at 336.

Alluding to *M-K-T*, the Court said in *General Committee v. Southern Pacific Co.*, 320 U.S. 338, 343-4 (1943):

"(W)e believed that Congress left the so-called jurisdictional controversies between unions to agencies or tribunals other than the courts."

Although the Firemen's Union apparently claims that there are some jurisdictional disputes that do not fall within the ambit of the administrative agencies created under the Act and are, therefore, within the jurisdiction of the courts, this Court has clearly determined that all jurisdictional disputes are nonjusticiable. For example, in *Order of Railway Conductors v. Pitney*, 326 U. S. 561 (1946), this Court held that the judiciary did not have jurisdiction to restrain a carrier from allegedly violating its collective bargaining agreement with the conductors' union by removing some of its members from certain jobs and replacing them with employees from another craft represented by the trainmen's union. The question of whether the conductors' contract was violated in that jurisdictional dispute was referred to the National Railroad Adjustment Board.[9] See also *Slocum v. Delaware, L. & W. R. Co.*, 339

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[9] The district court herein appropriately found that "the complaint was also predicated, in important part, upon an alleged dispute as to the interpretation and application of Article 26 of the collective bargaining agreement between L&N and BLF&E as the recognized representative of the craft or class of locomotive firemen," and concluded "that as to that aspect of the complaint this case involves a controversy, the determination of which is within the primary jurisdiction of the NRAB" (No. 18,479, A.57a). The court's statement referred to the allegations of paragraphs 11 and 12 of the complaint (No. 18,479, A. 9a-10a), by which the Firemen's Union asserts that all locomotive engineers must come exclusively from the ranks of fire-

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U.S. 239 (1950). Consistent therewith, this Court more recently found that a jurisdictional work-assignment dispute involving the interpretation and application of the bargaining agreements of competing unions was subject to compulsory arbitration in a single proceeding before the Adjustment Board. *Transportation-Communication Employees Union v. Union Pacific R. Co.*, 385 U. S. 157 (1966).

Under the above premises, the jurisdictional dispute herein, whether or not related to craft composition, is left for resolution by the proper administrative agencies, not the courts. And the court below so found. The Engineers' Union submits that the decision below was correct.

In *General Committee v. Missouri-K.-T. R. Co.*, 320 U.S. 323 (1943), the Engineers' Union brought an action seeking to have declared invalid an agreement between the Firemen's Union and the carrier, which concerned the same contractual provisions involved in the instant dispute. As does the Firemen's Union in the instant case, the Engineers' Union asserted that the acts of the former union and the carrier violated the provisions of section 2 of the Act. The Engineers also relied upon the *Clerks* case

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men, *i.e.*, individuals who had become engineers by promotions from the ranks of firemen on the L&N or some other railroad. If that were true, it does not appear on the face of Article 26, for the wording would merely indicate the setting up of a ratio of one fireman to be promoted to engineer for every employee hired directly in the craft of locomotive engineers. Thus, whether or not the respective collective bargaining agreements of the two unions require all engineers to be promoted firemen is a dispute involving the interpretation and application of those agreements and comes within the province of the Adjustment Board. In addition, under the Firemen's theory, the minority union would govern as to one of the basic areas for the craft of engineers. In effect, this would be a denial of the Engineers' rights as certified bargaining representative. See *Order of Ry. Conductors & Brakemen v. Switchmen's Union*, 269 F. 2d 726 (5th Cir. 1959), *cert. denied*, 361 U.S. 899 (1959).

and the *Virginian Railway* case. However, the Court, in holding the courts without power to decide the controversy, said:

> "It is our view that the issues tendered by the present litigation are not justiciable—that is to say that Congress by this Act has foreclosed resort to the courts for enforcement of the claims asserted by the parties." *Id.* at 327-28.

On the same day, this Court decided another dispute between the two unions involved herein. In part, the case contained the same facts as in the *M-K-T* case. However, there was an additional facet concerning the validity of an agreement obtained by the Firemen's Union to represent engineers in the handling of grievances. Once again, as does the Firemen's Union here, the Engineers argued that section 2, Third and Fourth prohibited the carrier from influencing employees in their choice of representatives. As does the Firemen's Union here, the Engineers contended that the action of the carrier would in effect coerce and interfere with its employees' selection of their union. Nevertheless, in finding that the courts had not been entrusted with the task of resolving these controversies, this Court stated that it saw "no reason for differentiating this jurisdictional dispute from the others." *General Committee v. Southern Pacific Co.*, 320 U. S. 338, 344 (1934).

The Firemen's Union, now reversing its position from that taken in the above authoritative cases, is necessarily requesting this Court to reject its prior decisions therein. However, no justification is given or reason advanced in support of a reversal of those long established holdings.

That the decision below is correct has also been the position of the National Mediation Board as set forth by the Department of Justice in its brief in *National Mediation Board v. Brotherhood of Locomotive Engineers*, Case

No. 22,185 (D.C. Cir.), *appeal pending* from 284 F. Supp. 344 (D.D.C. 1968). There, the Board said (Br., pp. 43-44):

> "The result reached by the Sixth Circuit seems correct and wholly consistent with our position; the courts clearly do *not* have jurisdiction to make the determinations apparently requested. See *General Committee v. Missouri-K.-T. R. Co.*, 320 U.S. 323. * * * The Sixth Circuit's holding on the latter point [the scope of section 2, Ninth] instead simply follows the Supreme Court's ruling in *General Committee v. Missouri-K.-T. R. Co., supra,* that whether or not the dispute falls within § 2, Ninth, its merits are not for the courts to resolve." [10] (Emphasis in original; brackets supplied.)

2. The decision of the court of appeals was in accord with previous decisions of that circuit and the other courts of appeal. In the opinion below, the court followed its decision in *Brotherhood of Ry. & S. S. Clerks v. United Air Lines,* 325 F. 2d 576 (6th Cir. 1963), wherein the court broke through form (allegations of section 2 violations) to substance and found that the facts involved a representation dispute within the NMB's jurisdiction.[11] The court in *United Air Lines* stated:

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[10] The above statement by NMB is clearly contrary to the petitioners' assertion of the NMB's position with respect to this case (Pet., p. 20). The above quotation on behalf of the Board appears to be entirely consistent with its present view in the instant dispute as expressed in its brief to the Courts of Appeals. There NMB seems to adopt as to its powers or function in this dispute a "wait-and-see" approach, *i.e.*, both the Engineers' and Firemen's Unions may bargain over the particular problem involved until such time as the number and terms of apprentice engineer agreements, whether 5 or 105, provide sufficient information for the Board to decide which craft should include apprentice engineers and which union should, therefore, represent those apprentices (Br., pp. 16-35).

[11] This Court initially granted certiorari (377 U.S. 903). The Solicitor General filed an amicus curiae brief, which argued that

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> "Regardless of what action may have been taken or may hereafter be taken by the National Mediation Board in this dispute, it is our opinion that the District Court was correct in holding that it did not have jurisdiction." *Id.* at 579.

This view obviously emanated from the following comment contained in this Court's opinion in the *M-K-T* case:

> "There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized." 320 U.S. at 337.

In so ruling, the decision below is consistent with all of those decisions of other circuits, which this respondent has been able to find on the same subject. In *Division 14, Order of R. R. Telegraphers v. Leighty,* 298 F. 2d 17 (4th Cir. 1962), *cert. denied,* 369 U. S. 885 (1962), the Fourth Circuit held that an intra-union jurisdictional dispute as to the integration of seniority of employees represented by the plaintiff local union was a representation dispute within the exclusive jurisdiction of the NMB. In *Howard v. St. Louis—S. F. Ry. Co.,* 361 F. 2d 905 (8th Cir. 1966), *cert. denied,* 385 U. S. 969 (1966), the Eighth Circuit held, despite allegations of section 2 violations and the NMB's refusal to decide the dispute, that only the NMB had the power under the Act to resolve the incipient questions of craft or class determination and that, therefore, claimants were precluded from resorting to the federal courts for resolution of their disputes. In *Southern Pacific Co. v. Switchmen's Union,* 356 F. 2d 332 (9th Cir. 1966), the Ninth Circuit, in a surprisingly similar case to

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the Sixth Circuit's decision "runs counter to the Board's construction of its own jurisdiction under the Railway Labor Act" (No. 17,588, A. 36b-37b), and urged reversal of the lower court's decision. Having considered the briefs submitted by the parties and the Solicitor General, this Court dismissed the writ of certiorari as being improvidently granted (379 U. S. 26).

the one at bar, found the basic or threshold question of representation and jurisdictional authority of the competing unions to fall within the exclusive province of the NMB. Using language fully applicable to this case, the court of appeals stated:

> "SUNA apparently feels the need to extricate itself from what it now regards as an outmoded, unreasonable and discriminatory craft classification. It pictures itself as involved in a fight against ultimate craft extinction, based not upon the fact that technical advances have eliminated the need for work it performs but rather upon the fact that existing craft lines are no longer appropriate. If so, it would seem that the resolution of its problems falls within the adjudicatory jurisdiction of the Mediation Board under Section 2, Ninth. That section, in providing for the certification of bargaining representatives, would seem necessarily to encompass the essential preliminary steps of fixing craft lines and of resolving any inter-union disputes in that respect." *Id.* at 335.

And in *Ruby v. American Airlines*, 323 F. 2d 248 (2nd Cir. 1963), *cert. denied*, 376 U.S. 913 (1964), the Second Circuit refused to grant the Air Line Pilots Association injunctive relief to prevent an air carrier and a committee of pilots, which became the nucleus of a new union, from dealing with one another and to require the airline to bargain with the Association. Although there was evidence that the air carrier had offered economic inducements to cause its pilots to desert the Association, the court of appeals affirmed the decision on summary judgment which dismissed the complaint for want of jurisdiction over the subject matter. Relying on this Court's holdings in the *M-K-T* and *Southern Pacific* cases, that court found that the action concerned the proper representation of the airline's pilots, a subject which Congress conferred the exclusive duty upon the NMB to determine.

Petitioners' contention that the ruling below conflicts with the Fifth Circuit's decision in *United Industrial Workers v Galveston Wharves,* 351 F. 2d 183 (1965), is unavailing (Pet., p. 15). First, unlike the above cited authorities, that case did not present a jurisdictional dispute wherein the real adversaries were two unions. Second, it is submitted that, on the facts of the instant case, the Fifth Circuit would have followed an earlier decision rendered by it in *Order of Ry. Conductors & Brakemen v. Switchmen's Union,* 269 F. 2d 726 (5th Cir. 1959), *cert. denied,* 361 U.S. 899 (1959). In the latter case, the Fifth Circuit held that a collective agreement between the railroad and the switchmen's union giving yard work to yardmen was valid, since that union had been certified as the exclusive bargaining representative for yard work by the NMB. Therefore, that court would have found in the instant situation that the Engineers' Union, as certified representative of the craft of locomotive engineers on the L&N, has the exclusive prerogative to bargain on the subjects of hiring, seniority and work in the engineers craft, even though these matters affect the work performed and the seniority of engineers belonging to the Firemen's Union; and that the complaint herein did not present a controversy to be decided by the courts.

In sum, the decisions of the various courts of appeals consistently apply the rationale expressed by the lower court in the instant case.

3. This case is not an appropriate vehicle for determining the statutory duties of the National Mediation Board. In fact, the instant decision is not dependent upon resolution of the scope of jurisdiction given the NMB under section 2, Ninth of the Act, as raised by the petitioners (Pet., pp. 18-21). Although the opinion below mentions the NMB, the holding therein is merely that the

present controversy is a jurisdictional dispute, which may not be resolved by the courts. The teachings of this Court have clearly been that the courts do not have that function.

The extent of the NMB's duties under section 2, Ninth and the power of the courts to determine those duties and to require the NMB to perform them are issues that need not be decided in the instant case. Whether this Court need ever give its attention to those questions should await consideration in a case where they are properly and directly raised. The Court has already determined that the NMB's actions are reviewable to the extent necessary to determine whether the Board performed its statutory duty under section 2, Ninth. *Brotherhood of Ry. & S.S. Clerks v. Non-Contract Employees Association,* 380 U.S. 650 (1965). However, if the specific questions posed may later require some action of the Court, they may more appropriately be considered, if at all, in *National Mediation Board v. Brotherhood of Locomotive Engineers, supra,* pp. 21-22.

Therefore, the determination by the court of appeals that there was a jurisdictional dispute between the two unions, which the courts may not decide, raises no novel or important issue which warrants review by this Court. The case involves a factual situation, fully canvassed by by the court below, which is governed by long established legal precedent.

CONCLUSION.

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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